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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KENNETH R BURNETT,

11 Petitioner,

12 v.

13 UNITED STATES OF AMERICA,

14 Respondent.

CASE NO. C22-0361JLR

ORDER

15 **I. INTRODUCTION**

16 Before the court is Petitioner Kenneth R. Burnett's motion to vacate judgment
17 pursuant to 28 U.S.C. § 2255. (Mot. (Dkt. # 1); Reply (Dkt. # 11).) Respondent the
18 United States of America (the "Government") opposes the motion. (Resp. (Dkt. # 10).)
19 The court has considered the parties' submissions, the balance of the record, and the
20 applicable law. Being fully advised, the court DENIES Mr. Burnett's motion.

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II. BACKGROUND

Mr. Burnett is a 50-year-old inmate who is currently detained at Federal Correctional Institution-Phoenix (“FCI-Phoenix”). (*See* Resp. at 4; Presentence Investigation Report (“PSR”) (CR¹ Dkt. # 28 (sealed)) at 2.) On January 3, 2017, two individuals working undercover with the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”)—a confidential informant (“CI”) and an ATF agent—met Mr. Burnett at his residence to acquire a firearm. (PSR at 3-4.) Mr. Burnett showed them a loaded 12-gauge shotgun, a Norinco SKS rifle, and a Star Firestar 9-millimeter pistol. (*Id.* at 4.) At the same time, the CI discussed purchasing a half-ounce of heroin from Mr. Burnett. (*Id.*) After Mr. Burnett agreed to sell the CI a half-ounce of heroin, the CI paid Mr. Burnett and then returned later that day—again with the undercover agent—to pick up the heroin. (*Id.*) Approximately a week later, the ATF executed a search warrant on Mr. Burnett’s property and arrested Mr. Burnett. (*Id.*) During his arrest, ATF agents seized 15.6 grams of methamphetamine, 0.8 grams of heroin, a Norinco SKS rifle, a Star Firestar 9-millimeter pistol, 200 bullets, and two digital scales. (*Id.*) Mr. Burnett was indicted on one count of possession of methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B); one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c); and one count

¹ The court uses “Dkt.” to refer to docket entries in this case and “CR Dkt.” to refer to docket entries in Mr. Burnett’s criminal case, *United States v. Burnett*, CR17-0029JLR (W.D. Wash.).

1 of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (*See generally*
2 Indictment (CR Dkt. # 11).)

3 On April 20, 2017, the parties entered into a plea agreement. (*See generally* (Plea
4 Agreement (CR Dkt. # 24).) As part of the plea agreement, the Government agreed not
5 to prosecute the possession of a firearm in furtherance of a drug trafficking crime charge.
6 (*See generally* Superseding Information (CR Dkt. # 20); Resp. at 4; Plea Agreement.)
7 Accordingly, Mr. Burnett pleaded guilty to one count of possession of methamphetamine
8 with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) and one
9 count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (*See* Plea
10 Agreement ¶ 2.) Pursuant to the terms of the plea agreement, the Government agreed to
11 recommend no more than 15 years of incarceration, and Mr. Burnett agreed to
12 recommend no less than 10. (*See id.* ¶ 14.)

13 The U.S. Probation Office found Mr. Burnett's total offense level to be 25 based
14 on several factors, including: a base offense level of 24; a two-level upward deviation for
15 the possession of three firearms; a two-level upward deviation for maintaining premises
16 for the purpose of manufacturing or distributing a controlled substance; and a three-level
17 downward deviation for acceptance of responsibility. (*See* PSR at 6.) It further found
18 Mr. Burnett's criminal history category to be III based on his: (1) 2002 conviction for
19 carrying and possessing a firearm in furtherance of a drug trafficking crime; and (2) 2013
20 conviction for possession of heroin. (*See id.* at 7-10.) Thus, it calculated Mr. Burnett's
21 sentencing guidelines range as 70-87 months. (*See id.* at 13.)

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1 In its presentence report, the U.S. Probation Office also acknowledged the
2 significant benefits that Mr. Burnett received through the Government’s “exercise of
3 charging discretion” in the plea agreement. (*Id.* at 14.) It noted that had Mr. Burnett
4 been convicted of the § 924(c) count (possession of firearm in furtherance of drug
5 trafficking) that the Government agreed to dismiss, “it would be his second [§ 924(c)]
6 conviction and, thus, the mandatory minimum prison sentence would have been 25 years,
7 which would have been required to run consecutively to the drug offense charged in
8 [Count 1] (a five-year mandatory minimum sentence offense).” (*Id.*) Thus, “Mr. Burnett,
9 by virtue of the plea agreement, . . . avoided a 30-year mandatory minimum sentence (or
10 more had an additional § 924(c) count been charged as it could have been).” (*Id.*)

11 On September 5, 2017, the court sentenced Mr. Burnett to 10 years of
12 imprisonment and five years of supervised release.² (Judgment (CR Dkt. # 40); 9/5/17
13 Min. Entry (CR Dkt. # 39).) Mr. Burnett did not appeal. (*See generally* CR Dkt.) He
14 was remanded into custody following his sentencing hearing, and his projected release
15 date is October 22, 2025. (*See* Judgment at 2; Comp. Release Memo. (CR Dkt. # 54
16 (sealed)) at 1; Resp. at 4.)

17 On June 18, 2020, Mr. Burnett filed his first motion pursuant to 28 U.S.C. § 2255,
18 seeking to vacate his conviction for felon in possession of a firearm based on *Rehaif v.*

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20 ² Consistent with the plea agreement, the Government recommended a sentence of 15
21 years and Mr. Burnett recommended a sentence of 10 years at the sentencing hearing. (*See*
22 *generally* Plea Agreement; Sentencing Tr. (CR Dkt. # 45).) Additionally, the court adopted the
U.S. Probation Office’s sentencing guidelines calculation, finding that Mr. Burnett’s total
offense level was 25 and that he was in criminal history category III, resulting in guidelines
range of 70-87 months. (Sentencing Tr. at 26:18-20.)

1 *United States*, __ U.S. __, 139 S. Ct. 2191 (2019). *See* 2255 Mot., *Burnett v. United*
 2 *States*, No. C20-0947JLR, Dkt. 1. After the Supreme Court’s decision in *Greer v. United*
 3 *States*, __ U.S. __, 141 S. Ct. 2090 (2021), the court granted the parties’ joint motion to
 4 dismiss Mr. Burnett’s first § 2255 motion. 6/30/21 Order, *Burnett*, No. C20-0947JLR,
 5 Dkt. 14.

6 Mr. Burnett filed the instant 28 U.S.C. § 2255 motion on March 25, 2022.³ (*See*
 7 *generally* Mot.) He argues that he is entitled to relief because his federal sentencing
 8 guidelines calculation was based on a state conviction that has since been vacated on
 9 constitutional grounds. (*See id.* at 1 (claiming that he is entitled to relief “on
 10 constitutional error grounds and/or because the sentence ‘is otherwise subject to collateral
 11 attack’ under § 2255(a)”).) The vacatur and dismissal of his 2013 conviction for
 12 possession of heroin “eliminates two of his five criminal history points, reducing his
 13 criminal history category from III to II and his advisory guidelines range from 70 to 87
 14 months to 63 to 78 months.” (*Id.*) Mr. Burnett thus asks the court to vacate his sentence,
 15 “schedule a resentencing hearing,” and “resentence him using the correct advisory
 16 guideline[s] range.” (*Id.* at 6.)

17 The Government argues that court cannot reach the merits of Mr. Burnett’s motion
 18 because his habeas claim is procedurally defaulted. (Resp. at 5-6.) If the court finds that
 19 Mr. Burnett can overcome his default, the Government “concedes that, on these facts,
 20 [Mr.] Burnett can attack the judgment of this [c]ourt.” (*Id.* at 7.) However, the

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 22 ³ Mr. Burnett simultaneously filed a motion to reduce sentence pursuant to 18 U.S.C.
 § 3582(c)(1)(A)(i). (*See* RIS Mot. (CR Dkt. # 46).)

Government argues that “rather than affording [Mr.] Burnett a plenary resentencing, the [c]ourt should correct [Mr.] Burnett’s sentence by revising his criminal history category and Guidelines range, updating the Statement of Reasons, . . . reimposing the 10-year sentences,” and directing “U.S. Probation to amend the [presentence report] to reflect” Mr. Burnett’s vacated state conviction. (*Id.* at 11.)

III. ANALYSIS

The court begins by addressing the legal standard for motions under 28 U.S.C. § 2255. It then discusses whether Mr. Burnett has met § 2255’s statutory prerequisites before turning to the issue of whether Mr. Burnett’s claim is procedurally defaulted and whether he is entitled to a certificate of appealability.

A. Legal Standard for Motions Under 28 U.S.C. § 2255

A petitioner seeking relief under 28 U.S.C. § 2255 must prove the existence of an error rendering his conviction unlawful. *See Simmons v. Blodgett*, 110 F.3d 39, 42 (9th Cir. 1997); *see also Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938); *Bell v. United States*, No. C19-2018JCC, 2020 WL 3542503, at *2 (W.D. Wash. June 30, 2020). A prisoner in custody for a federal law violation may move to vacate, set aside, or correct the sentence under four circumstances: where (1) “the sentence was imposed in violation of the Constitution or laws of the United States”; (2) “the court was without jurisdiction to impose such sentence”; (3) “the sentence was in excess of the maximum authorized by law”; or (4) the sentence is otherwise “subject to collateral attack.” 28 U.S.C. § 2255(a).

Pursuant to § 2255(f), a petition for habeas relief must be brought within one year of: (1) “the date on which the judgment of conviction became final”; (2) “the date on

1 which the impediment to making a motion created by governmental action in violation of
 2 the Constitution or laws of the United States is removed, if the movant was prevented
 3 from making a motion by such governmental action”; (3) “the date on which the right
 4 asserted was initially recognized by the Supreme Court, if that right has been newly
 5 recognized by the Supreme Court and made retroactively applicable to cases on collateral
 6 review”; or (4) “the date on which the facts supporting the claim or claims presented
 7 could have been discovered through the exercise of due diligence.” *See id.*
 8 § 2255(f)(1)-(4).

9 **B. Timeliness and Other Statutory Prerequisites**

10 As a threshold matter, Mr. Burnett has met the statutory prerequisites. Because
 11 Mr. Burnett is currently incarcerated, he meets § 2255’s “custody” requirement. *See*
 12 *Matus-Leva v. United States*, 287 F.3d 758, 761 (9th Cir. 2002). In addition, Mr. Burnett
 13 timely filed the instant motion under § 2255(f)(4).⁴ Mr. Burnett’s motion is predicated
 14 on the Snohomish County Superior Court’s September 16, 2021 vacatur of one of his
 15 prior convictions. (Mot. at 1; *id.*, Ex. 1 (“Vacatur Order”).) Mr. Burnett diligently
 16 sought vacatur of that conviction once the basis to do so became available, and he filed
 17 the instant motion on March 25, 2022—well within the one-year deadline. (*See generally*
 18 Mot.); *Johnson v. United States*, 544 U.S. 295 (2005) (holding one-year period begins

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⁴ The Government concedes that the instant motion was timely filed. (*See* Resp. at 6.)

running when petitioner receives notice of order vacating prior conviction, if vacatur was pursued with due diligence); 28 U.S.C. § 2255(f)(4).⁵

C. Procedural Default

“The general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review.” *Sanchez Llamas v. Oregon*, 548 U.S. 331, 350 51 (2006); *Bousley v. United States*, 523 U.S. 614, 622 (1998). If a “defendant fails to raise an issue before the trial court, or presents the claim and then abandons it, and fails to include it on direct appeal” the issue is procedurally defaulted and may not be raised in a 28 U.S.C. § 2255 motion “except under unusual circumstances.” *Thorson v. United States*, No. C18-0136RSM, 2019 WL 3767132, *6 (W.D. Wash. Aug. 9, 2019) (citing *Bousley*, 523 U.S. at 622). In the instant motion, Mr. Burnett contends that his sentence must be vacated because a state conviction that affected this court’s sentencing guidelines range calculation has been vacated. (See Mot. at 1, 4-5.) However, Mr. Burnett’s claim is procedurally defaulted because he never raised this claim at sentencing or on direct appeal.⁶ (See generally Sentencing Tr.; CR Dkt.)

⁵ While a petitioner is not permitted to bring a second or successive motion under § 2255 absent certification by the “appropriate court of appeals,” see 28 U.S.C. § 2255(h), the court agrees that the instant motion is effectively Mr. Burnett’s first § 2255 motion because his earlier motion was jointly dismissed prior to any adjudication on the merits. See *Slack v. McDaniel*, 529 U.S. 473, 486-87 (2000) (stating that a motion is “second or successive” if an earlier motion was adjudicated on the merits); 6/30/21 Order, *Burnett*, No. C20-0947JLR, Dkt. 14 (granting the parties’ joint motion to dismiss Mr. Burnett’s § 2255 motion); (see also Resp. at 6; Reply at 1).

⁶ The parties do not dispute that Mr. Burnett’s claim is procedurally defaulted for this reason. (See generally Resp. at 5-6; Reply at 2-3.) Rather, they dispute whether Mr. Burnett can overcome his default. (See generally Resp. at 5-6; Reply at 2-3.)

1 A defendant can overcome procedural default and have the court consider the
 2 merits of his § 2255 claim by demonstrating “both (1) ‘cause’ excusing his double
 3 procedural default and (2) ‘actual prejudice’ resulting from the errors of which he
 4 complains.” *United States v. Frady*, 456 U.S. 152, 167 (1982).⁷ A petitioner may
 5 demonstrate “cause” by showing “that the procedural default is due to an ‘objective
 6 factor’ that is ‘external’ to [him] and that ‘cannot be fairly attributed to him.’” *Manning*
 7 *v. Foster*, 224 F.3d 1129, 1133 (9th Cir. 2000) (quoting *Coleman v. Thompson*, 501 U.S.
 8 722, 753 (1991)). The petitioner can make this showing when “the factual or legal basis
 9 for [the] claim was not reasonably available to counsel” at the time of sentencing or
 10 direct appeal. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *United States v. Braswell*,
 11 501 F.3d 1147, 1150 (9th Cir. 2007).

12 To establish actual prejudice, the petitioner must show that the error worked to his
 13 “actual and substantial disadvantage.” *Frady*, 456 U.S. at 170 (demonstrating that the
 14 alleged error “created a *possibility* of prejudice” is insufficient). “To demonstrate
 15 ‘prejudice’ as to a Guidelines error, the petitioner ‘must at least show that the error
 16 affected the outcome of his sentencing proceeding.’ Put another way, ‘[p]rejudice is
 17 shown when “there is a reasonable probability” that the result of a petitioner’s sentencing
 18 would have been different without the error to which the petitioner failed to object.’”
 19 *Carpio v. United States*, 218 F. Supp.2d 1182, 1195 (W.D. Wash. 2016) (citations
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21 ⁷ Alternatively, a petitioner can show “actual innocence” to overcome procedural default.
 22 *Bousley*, 523 U.S. at 622-23. Mr. Burnett has not raised that argument here. (*See generally*
 Mot.; Reply.)

omitted) (first quoting *United States v. Dean*, 169 F. Supp. 3d 1097, 1109 (D. Or. 2016); and then quoting *Gilbert v. United States*, No. C15-1855JCC, 2016 WL 3443898, at *3 (W.D. Wash. June 23, 2016)); *Correll v. Stewart*, 137 F.3d 1404, 1416 (9th Cir. 1998) (holding that the petitioner did not establish actual prejudice where he could not “make the requisite showing that his sentence would have been different” absent the alleged error); *see also Murray*, 477 U.S. at 493-94 (stating that the level of prejudice required to overcome procedural default is “significantly greater than that necessary under the more vague inquiry suggested by the words ‘plain error’”).

The Government contends that Mr. Burnett cannot overcome procedural default as to this claim. (Resp. at 5-6.) First, the Government concedes that because “the factual basis [for this claim] was unavailable at the time of [sentencing or] direct appeal,” Mr. Burnett has established “cause” to excuse his default. (*Id.*) However, “because the plea agreement requires [Mr.] Burnett to recommend a 10-year sentence regardless of the [advisory guidelines] range,” the Government argues that Mr. Burnett “cannot show that he was sufficiently prejudiced by this error to overcome his procedural default.” (*Id.*) Mr. Burnett argues that the Government “suggests a thought-process to this [c]ourt that is not known, and cannot be known by the parties, namely what sentence this [c]ourt would impose if the parties made the same recommendation but the Guidelines were even lower than they had been before. (Reply at 2; *id.* at 3 (noting that the court used the advisory guidelines range as a “starting point” and “remain[ed] cognizant of them throughout the sentencing process” (quoting Sentencing Tr. at 27:1-3))).) The “question of prejudice,” he contends, “has nothing to do with breach of the plea agreement, only whether there is a

1 reasonable probability that this [c]ourt would change the sentence, which is an objective
2 question that only the [c]ourt can answer.” (*Id.* at 2.)

3 While the court agrees that Mr. Burnett has established sufficient cause to excuse
4 his default, it concludes that he cannot meet his burden to show actual prejudice. As Mr.
5 Burnett correctly notes, the question of whether there is a reasonable probability that this
6 court would have sentenced him to less than 10 years had his advisory guidelines range
7 been 63-78 months, rather than 70-87 months, “is an objective question that only the
8 [c]ourt can answer.” (*See Reply* at 2.) For the reasons stated below, the court concludes
9 that it would not have sentenced Mr. Burnett to less than 10 years even if his advisory
10 guidelines range had been 7-9 months lower.

11 Under the current federal sentencing scheme,⁸ the sentencing guidelines are only
12 advisory, meaning that the court is not required to sentence a defendant within the
13 applicable guidelines range. *United States v. Booker*, 543 U.S. 220, 264 (2005). The
14 guidelines are “the starting point and the initial benchmark.” *Gall v. United States*, 552
15 U.S. 38, 49 (2007); *Molina-Martinez v. United States*, 578 U.S. 189, 198-99 (2016)
16 (stating that the court should “remain cognizant of [the guidelines] throughout the
17 sentencing process” (quoting *Peugh v. United States*, 569 U.S. 530, 541 (2013))). The
18 guidelines “are not the only consideration, however.” *Gall*, 552 U.S. at 49.
19 “Accordingly, after giving both parties an opportunity to argue for whatever sentence
20 they deem appropriate, the district judge should then consider all of the § 3553(a) factors
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22 ⁸ The same sentencing scheme was in effect when Mr. Burnett was sentenced.

1 to determine whether they support the sentence requested by a party.” *Id.* at 49-50; *see*
 2 *also United States v. Doe*, 705 F.3d 1134, 1153 (9th Cir. 2013).

3 In accordance with these principles, the court began its analysis of the appropriate
 4 sentence by calculating Mr. Burnett’s advisory guidelines range. (*See* Sentencing Tr. at
 5 26:14-20, 27:1-3.) After it calculated Mr. Burnett’s advisory guidelines range as 70-87
 6 months, the court noted that Mr. Burnett’s sentencing was “unusual” because the parties
 7 “agreed[, pursuant to the plea agreement,] to make recommendations to the court greater
 8 than that range”—Mr. Burnett recommended 120 months and the Government
 9 recommended 180 months. (*See id.* at 26:18-23, 3:7-9, 4:7-9, 13:19-24; *see also* Plea
 10 Agreement ¶ 14.) The court then evaluated the parties’ recommendations in light of the
 11 § 3553(a) factors. (*See* Sentencing Tr. at 27:4-30:16.) With respect to the nature and
 12 circumstances of the offense, the court first took note of the significant benefits Mr.
 13 Burnett received by pleading guilty to an offense which carried a lower mandatory
 14 minimum (5 years) than the mandatory minimum he faced as originally charged (30
 15 years).⁹ (*Id.* at 27:9-25 (noting that the Government could have charged an additional
 16 possession of a firearm in-furtherance-of a drug trafficking crime, which would have also
 17 carried a 25-year mandatory minimum that would run consecutively to any other
 18 mandatory minimums).) The court then noted that the offenses that Mr. Burnett pleaded

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 20 ⁹ Because Mr. Burnett had already been convicted of a § 924(c) count (possession of
 21 firearm in furtherance of drug trafficking) in 2002, if he had been convicted of the § 924(c) count
 22 Government agreed to dismiss “it would be his second [§ 924(c)] conviction and, thus, the
 mandatory minimum prison sentence would have been 25 years, which would have been
 required to run consecutively to the drug offense charged in [Count 1] (a five-year mandatory
 minimum sentence offense).” (PSR at 14.)

1 guilty to are “extremely serious” because “Mr. Burnett has that prior conviction of not
2 only possessing firearms but using them in connection with crime.” (*Id.* at 28:1-10.)

3 With respect to the history and characteristics of Mr. Burnett, the court found that Mr.
4 Burnett’s mental health and chronic substance abuse issues, childhood challenges, and
5 lack of parental guidance were all relevant mitigating factors. (*Id.* at 28:11-18.)

6 However, it also found, taking into account Mr. Burnett’s significant prior
7 criminal history, that Mr. Burnett is “someone who is most comfortable being on the edge
8 or over the edge of the law, and that at the time of his arrest in this matter, he was
9 unconcerned about the fact that he’s living in the house with children, with weapons
10 readily accessible, with marijuana plants growing, apparently, in a separate building on
11 the property.” (*Id.* at 29:4-13; *see also id.* at 14:16-15:15 (stating that the court was
12 “alarm[ed]” and “concern[ed]” about Mr. Burnett’s failure to take responsibility for his
13 actions).) The court noted that a sufficient sentence was needed to reflect the extremely
14 serious offenses, to provide just punishment, and to promote respect for the law. (*Id.* at
15 29:14-21.) Given Mr. Burnett’s prior criminal history, the court concluded that
16 “[p]romoting respect for the law . . . is important here, in that Mr. Burnett has
17 demonstrated that that’s something he does not have at the present time.” (*Id.* at
18 29:19-21; *see also id.* at 20:9-21:10 (discussing Mr. Burnett’s past federal conviction for
19 carrying and possessing a firearm in furtherance of a drug trafficking crime and his
20 related, repeated supervised release violations); *id.* at 9:12-21:21 (same); *id.* at 28:19-21
21 (noting that “Mr. Burnett’s age, 45, and the relatively short sentences that the state has
22 imposed repeatedly” also factored into the court’s assessment of his conduct).)

1 Regarding the consideration of deterrence, the court noted that it would be optimistic to
 2 believe Mr. Burnett would never break the law again given his background and stated
 3 that “with age . . . comes experience, and you understand the consequences of what
 4 you’re doing.” (*Id.* at 29:22-30:3.) Finally, with respect to the protection of the public
 5 from further crimes by this defendant, the court noted that it was “hopeful that with the
 6 recommended sentences, Mr. Burnett will be in his mid 50s when he’s discharged and
 7 will have a period of supervised release, which, hopefully, will go better than the last
 8 time.” (*Id.* at 30:4-8.)

9 As is evident from the sentencing transcript and the statement of reasons, the court
 10 ultimately concluded that the § 3553(a) factors supported Mr. Burnett’s recommendation
 11 of 120 months—“a sentence which is sufficient but not greater than necessary” to achieve
 12 the goals of sentencing. (*See, e.g.*, Sentencing Tr. at 27:4-31:5.) Because the court chose
 13 to adopt Mr. Burnett’s significantly above-guidelines recommendation in light of the
 14 § 3553(a) factors, the court finds that there is no reasonable probability that it would have
 15 sentenced Mr. Burnett to less than 120 months had his advisory guidelines range been 7-9
 16 months shorter.¹⁰

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 18 ¹⁰ While not discussed by the parties, the Ninth Circuit has held, on direct review, that the
 19 misapplication of an advisory guidelines range constitutes plain error that affects a defendant’s
 20 substantial rights. *See United States v. Dean*, 169 F. Supp. 3d 1097, 1109 (D. Or. 2016) (citing
 21 *United States v. Vargem*, 747 F.3d 724, 729 (9th Cir. 2014)); *Molina-Martinez*, 578 U.S. at
 22 200-01 (“In most cases a defendant who has shown that the district court mistakenly deemed
 applicable an incorrect, higher Guidelines range has demonstrated [plain error].”). The cases
 where lower courts have adopted the Ninth Circuit’s direct review reasoning in the context of
 procedural default generally involve: (1) defendants whose original advisory guidelines ranges
 were calculated using the residual clause of the Career Offenders Guideline and whose new
 advisory guidelines ranges are almost half of their original ranges following the holding in
United States v. Johnson, 576 U.S. 591 (2015); and (2) judges who relied on the advisory

1 Because Mr. Burnett cannot overcome his procedural default, the court cannot
 2 consider the merits of his § 2255 claim.¹¹ Accordingly, the court DENIES Mr. Burnett's
 3 § 2255 motion.

4 **D. Certificate of Appealability**

5 As a final matter, the court notes that a petitioner seeking post-conviction relief
 6 may appeal a district court's dismissal of a 28 U.S.C. § 2255 motion only after obtaining
 7 a certificate of appealability. 28 U.S.C. § 2253(c); *see generally United States v. Asrar*,
 8 116 F.3d 1268, 1269-70 (9th Cir. 1997). A certificate of appealability may issue only
 9 where a petition has made "a substantial showing of the denial of a constitutional right."
 10 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard "by demonstrating that jurists
 11

12 guidelines range in sentencing the defendants to a within- or below-guidelines range term of
 imprisonment. *See, e.g., Dean*, 169 F. Supp. 3d at 1105-14; *United States v. Savage*, 231 F.
 13 Supp. 3d 542, 557-69 (C.D. Cal. 2017). Those cases are distinguishable from the one at hand
 because this court "thought the sentence it chose was appropriate irrespective of the" advisory
 14 guidelines range. *Molina-Martinez*, 578 U.S. at 200-01 ("There may be instances when, despite
 application of an erroneous Guidelines range, a reasonable probability of prejudice does not
 15 exist. . . . [A judge's] explanation could make it clear that the judge based the sentence he or she
 selected on factors independent of the Guidelines."). As the record reflects, the court adopted
 16 Mr. Burnett's recommendation of a 120-month sentence, which was approximately three years
 more than the highest end of the advisory guidelines range, based on its review of the § 3553(a)
 17 factors. Even if the guidelines range had been lowered by 7-9 months, the court would have still
 adopted the parties' recommended upward variance in light of the § 3553(a) factors.

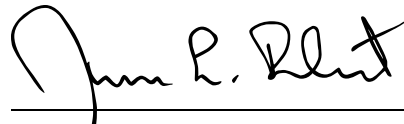
18 ¹¹ Because Mr. Burnett's claim is procedurally defaulted, the court determines that an
 evidentiary hearing is unnecessary. Under § 2255, the court must hold an evidentiary hearing
 19 unless "the motion and the files and records of the case conclusively show that the prisoner is
 entitled to no relief." 28 U.S.C. § 2255(b); *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir.
 20 1989) ("No hearing is required if the allegations, viewed against the record, either fail to state a
 claim for relief or are so palpably incredible or patently frivolous as to warrant summary
 21 dismissal."). Here, neither Mr. Burnett nor the Government request an evidentiary hearing. (*See*
generally Mot.; Reply; Resp. at 11.) The court concludes that the record in this matter (*see*
 22 *generally* CR Dkt.) is a sufficient basis on which to determine that Mr. Burnett's claim is
 procedurally defaulted and that he is entitled to no relief. *See Shah*, 878 F.2d at 1158.

1 of reason could disagree with the district court's resolution of his constitutional claims or
2 that jurists could conclude the issues presented are adequate to deserve encouragement to
3 proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard,
4 the court concludes that Mr. Burnett is not entitled to a certificate of appealability.

5 IV. CONCLUSION

6 For the foregoing reasons, the court DENIES Mr. Burnett's motion to vacate
7 judgment pursuant to 28 U.S.C. § 2255 (Dkt. # 1). The court DISMISSES this matter
8 with prejudice and DECLINES to issue a certificate of appealability.

9 Dated this 27th day of June, 2022.

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12 JAMES L. ROBART
13 United States District Judge
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